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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re San Francisco Bay Brand, Inc.

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Serial No. 76569806

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Kin-Wah Tong of Moser, Patterson & Sheridan, LLP for San Francisco Bay Brand, Inc.

Michele-Lynn Swain, Trademark Examining Attorney, Law Office 116 (Meryl L. Hershkowitz, Managing Attorney).

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Before Hairston, Bucher and Zervas, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

San Francisco Bay Brand, Inc. has filed an application to register on the Principal Register the mark NATURAL FORMULATED DIETS for "tropical, marine, fresh water and salt water fish feed, and feed used in cultivation of fishes, mollusks and crustaceans."<sup>1</sup>

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<sup>1</sup> Serial No. 76569806, filed January 7, 2004, based on a bona fide intention to use the mark in commerce.

The trademark examining attorney has issued a final refusal to register, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified goods.

Applicant has appealed. Both applicant and the examining attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The examining attorney contends that the mark NATURAL FORMULATED DIETS describes the subject matter of the goods which are "naturally formulated diets." The examining attorney argues that applicant's mark is simply a combination of merely descriptive words that, when considered in its entirety, is also merely descriptive. In support of her position, the examining attorney submitted dictionary definitions of the words "natural," "formulated," and "diet;" excerpts of articles retrieved from the NEXIS database; the results of Internet searches; and copies of third-party registrations.

Applicant contends that its mark is not merely descriptive; that the mark suggests "the general impression of healthy nutrition or a healthy nutritional regime[n]" (1/21/05 Response, p. 2); that the mark must be considered as a whole; and that a potential purchaser would not understand from the mark whether the goods are food or a

nutritional regimen or whether the goods are for humans or pets. Further, applicant argues that its mark "is no more descriptive than the marks of several other companies that were, in fact, granted registration." (Brief, unnumbered page 4). Applicant included in its brief a list of purported third-party registrations for marks that include the word "DIET" for human and animal food and nutritional supplements.

A term is merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F. 2d 811, 200 USPQ 215 (CCPA 1978); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); and In re MBAssociates, 180 USPQ 338 (TTAB 1973).

The examining attorney bears the burden of showing that a mark is merely descriptive of the identified goods

or services. See *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). In this regard, we now consider the evidence submitted in support of the refusal. The examining attorney relies on the following dictionary definitions:

**formulate:** 2. To prepare according to a specified formula.  
The American Heritage Dictionary of the English Language (Fourth edition 2000).

**natural:** 3. Produced by nature: present in or produced by nature; rather than being artificial or created by people.  
Encarta World English Dictionary (North American Edition 2004).

**diet:** 1. What a person or animal eats: the food that a person or animal usually consumes.  
Encarta World English Dictionary (North American Edition 2004).

The examining attorney submitted excerpts of articles retrieved from the NEXIS database which refer to "formulated diets," of which the following are examples:

Please, don't feed the animals. Today's farm livestock eat scientifically formulated diets.  
(Centre Daily Times, State College, PA; August 19, 2000).

The center spends \$202 a month to feed each big cat a zoo-formulated diet of ground horse meat, says compound manager Leslie Scott-Rose.  
(The Seattle Times, February 16, 1997)

Dairy farmers have bred high-producing supercows. They feed scientifically formulated diets.  
(USA Today, November 10, 1993)

They found that the fish digested the formulated diet better than the control, which was a commercial feed.

(Fish Farming International, October 1991)

Also, the examining attorney's search of "formulated diets" in "Google" includes the following representative "hits":

... Just as there are formulated diets for dogs, cats, rabbits, etc., formulated diets for birds are also available from veterinarians and pet stores.

("pages.prodigy.net/zaaubird/nutrition")

Farm-raised fish eating specially formulated diets high in fatty acids could improve people's health and also satisfy different ... .

("news.uns.purdue.edu/UNS")

Formulated diets are the easy, economical, healthy way to feed your birds ... .

("www.tropicalbird.com")

The examining attorney also submitted nine third-party registrations for marks that include the word NATURAL for animal food, and in each registration NATURAL is disclaimed.

As applicant correctly states, when the mark involves more than a single term, we must consider whether the mark as a whole is merely descriptive and not just the individual elements. In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004). As the Court stated in that case:

The PTO may properly consider the meaning of 'patents' and the meaning of '.com' with respect

to the goods identified in the application. However, if those two portions individually are merely descriptive of an aspect of appellant's goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.

When two or more descriptive terms are combined, the determination of whether the composite mark also has descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its descriptive significance in relation to the goods or services, the combination results in a composite that is itself descriptive. See, e.g., *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (TTAB 2002) [SMARTTOWER merely descriptive of commercial and industrial cooling towers]; *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) [AGENTBEANS merely descriptive of computer programs for use in development and deployment of application programs]; *In re Putnam Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) [FOOD & BEVERAGE ONLINE merely descriptive of news information services for the food processing industry]; and *In re Copytele Inc.*, 31 USPQ2d 1540 (TTAB 1994) [SCREEN FAX PHONE merely descriptive of facsimile terminals employing electrophoretic displays].

A review of all of the examining attorney's evidence shows that the words "natural," "formulated," and "diets" are individually descriptive of applicant's goods. As evidenced by the dictionary definitions in particular, the word NATURAL is descriptive in that applicant's fish feed may contain or consist of ingredients which are produced by nature rather than being artificial or created by people; the word FORMULATED is descriptive of the goods in that fish feed is a type of product that may be prepared according to a specified formula; and the word DIETS is descriptive in that it identifies "the food," i.e., the fish feed itself. In addition, the NEXIS and Internet evidence submitted by the examining attorney shows that the term "formulated diets" is used to describe animal food, and in particular, fish food. Further, we note that applicant itself uses the words "formulated" and "natural" in describing its goods in its product brochure. The following are examples:

MARINE CUISINE:

Formulated specially for marine carnivores. High in essential fatty acids, pigments, vitamins. Contains brine, shrimp, krill, clam, spirulina.

COMMUNITY MENU

Developed for freshwater community fish using all natural ingredients including brine shrimp. Fortified with stabilized vitamin C.

Also, there are several other references in the brochure to "formulated" (e.g., "Formulated for all goldfish") and "natural" (e.g., "This natural ingredient is a favorite for a variety of marine fish and invertebrates").

Moreover, we find that the mark as a whole, NATURAL FORMULATED DIETS, to be as descriptive of applicant's goods as are the individual words. Applicant argues that the mark is merely suggestive. However, we are the view that the mark does more than suggest. It immediately conveys that applicant's goods are fish feed formulated with natural ingredients. In sum, the combination of the individual terms does not evoke a new or unique commercial impression. Thus, we find that the mark in its entirety is merely the sum of its merely descriptive components and is equally merely descriptive of applicant's identified goods.

Applicant argues that a potential purchaser would not understand from the mark whether the goods are for humans or pets, or whether the goods are food or a nutritional regimen. This argument suggests that the mark should be viewed in the abstract and it is well settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information



about them." In re Tower Tech Inc., at 1316-17; see also In re Patent & Trademark Services Inc., 49 USPQ2d 1537 (TTAB 2002).

The purported third-party registrations of DIET marks relied on by applicant are not persuasive of a different result. As noted, applicant included a list of such registrations in its brief. Apart from the fact that the list is untimely (See Trademark Rule 2.142(d)), a mere listing of third-party registrations is not the way to make such registrations of record. See Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230 (TTAB 1992); In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983); In re Duofold Inc., 184 USPQ 638 (1974). In any event, it is well settled that even if an applicant can point to other registrations with "some characteristics similar to [the applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court." In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

In conclusion, when considered in connection with applicant's goods, the term NATURAL FORMULATED DIETS immediately conveys that applicant's goods are fish feed formulated with natural ingredients. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers

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and prospective customers of applicant's goods to readily perceive the merely descriptive significance of the term NATURAL FORMULATED DIETS as it pertains to applicant's goods.

**Decision:** The refusal to register under Section 2(e)(1) is affirmed.